(1)

Supreme Court, U.S.
FILED

02 976 DEC 10 2002

OFFICE OF THE CLERK

No.

In The
SUPREME COURT OF THE UNITED STATES

Edwin Durand, and Madelaine Durand, *Petitioner(s),*

v.

Syed M. Arif, Norman F. Rice, d.b.a North American Technical Trading Co., Inc., Gloria M. Rice, Clifford S. Rice, and Matthew G. Huntley, Esq.,

Respondent(s);

Jerry W. Slusser, James W. Scott, d.b.a Valtec Capital Corp., and Earthco Inc.,

Respondent(s).

On Petition For Writ Of Certiorari
To the Court of Appeal of the State of California
In And For The Third Appellate District

PETITION FOR WRIT OF CERTIORARI

Edwin Durand, Madelaine Durand, *Pro Se Petitioner(s)*
P.O. Box 34719, Reno, Nevada 89533
Tel: (775) 345-0141

38 pp

QUESTIONS PRESENTED FOR REVIEW

This case involved certain tort causes of action, and the validity of certain mining claims located on Federal land under the authority of the Department of the Interior, Bureau of Land Management and based on the Federal Code of Regulations, the Federal Mining Law of 1872, and the U.S. Public Law 94-579-Oct. 21, 1976, commonly known as FLPMA, the Federal Land Policy and Management Act. The trial court bifurcated this case, and conducted a bench trial on the Federal question of the validity of the mining claims. After the trial court entered a judgment on the mining claims, it refused to allow a jury trial on Petitioner's tort causes of action, which were not predicated on the mining claim issue, therefore denying Petitioner's Seventh Amendment right to a jury trial and their rights under the Fourteenth Amendment Due Process Clause.

1. Whether a state court has jurisdiction over the validity of Federal mining claims, which were located pursuant to Federal Statutes and Regulations on Federal land under the authority of a Federal agency.

2. Whether a state court can refuse to follow the U.S. and California Constitutions, U.S. Supreme Court precedents, U.S. and California statutes, and also their own Rules of Court and established precedents, and deny litigants their Seventh Amendment right to a jury trial and their rights guaranteed by the Fourteenth Amendment Due Process Clause, all without fear of reversal by use of an unpublished opinion.

Parties Below

Petitioners are Edwin Durand and Madelaine Durand.

Respondents are Norman Rice, Syed Arif, North American Technical Trade Company, Gloria Rice, Clifford Rice, Matthew G. Huntley, Esquire, Norman Rice Enterprises, Jerry W. Slusser, James W. Scott, Valtec Capital Corporation, and Earthco, Incorporated.

Table of Contents

QUESTIONS PRESENTED FOR REVIEW.....i
PARTIES BELOW.....ii
TABLE OF CONTENTS.....iii
TABLE OF AUTHORITIES.....v
TABLE OF APPENDICES.....vii
OPINIONS BELOW.....1
JURISDICTION.....1
CONSTITUTIONAL PROVISIONS
& U.S.C. CODES INVOLVED.....1
CALIFORNIA STATUTES AND COURT
RULES INVOLVED.....2
STATEMENT OF THE CASE
1. BASIS FOR FEDERAL JURISDICTION.....2
2. FACTUAL SUMMARY.....4
a. Witness Tampering by Respondent's
Attorneys Condoned by Trial Court.....9
b. Statement of Decision Substantiates
Petitioner's Tort Causes of Action
Were Never Adjudicated.....12
c. Respondents File Falsified Documents
With The Appellate Court.....14
d. Appellate Court Condones Respondent's
Attorneys Penal Code Violations.....16
REASONS FOR GRANTING THE PETITION.....18
1. California Appellate Court's Decision
Violates the U.S. Constitution Seventh
and Fourteenth Amendments and U.S.
Supreme Court Precedents.....18
2. Trial Court Was Barred From Entering
Judgment Until All Issues Were
Adjudicated.....19
3. Appellate Court Had To Fictionalize The
Record In Order To Affirm The Trial
Court Decision.....21

4. Appellate Court's Opinion Is Contrary To It's Own Decision In An Earlier Case..... 24
5. The Sanctions Granted Against Petitioners Violated the 14th Amendment..... 25
UNPUBLISHED OPINIONS DENY EQUAL JUSTICE UNDER LAW..... 28
CONCLUSION..... 30

Table of Authorities

Cases **Page(s)**

County of Los Angeles v. Kling, 474 U.S. 936 (1985).....30

Elston v. City of Turlock, 38 Cal.3d 227, 233
695 P.2d 713, 211 Cal.Rptr. 416 (1985).....24, 25

In re Marriage of Flaherty, 31 Cal.3d 637 (1982).....16

In re Marriage of David Reese and Joanne Guy
73 Cal.App.4th 1214, 87 Cal.Rptr.2d, 339 (1999).....27

Lytle v. Household Manufacturing, Inc.,
494 U.S. 545 (1990)..... 18, 23, 24

Meeker v. Ambassador Oil Corp.,
375 U.S. 160, 84 S.Ct. 273, 11 L.Ed.2d 261 (1963).....23

Schmier v. United States Court of Appeals for the Ninth Circuit and Judicial Council of the Ninth Circuit,
279 F.3d 817 (Cir. 9 2002).....29

Slusser v. Commodity Futures Trading Commission
210 F.3d 783 (7th Cir. 2000).....6

State Farm Fire & Casualty v. Pietak
90 Cal.App.4th 600, 109 Cal.Rptr.2d 256 (2001).....25

Constitutional and Statutory Provisions

U.S. Constitution, 14th Amendment.....1, 18, 20, 27

U.S. Constitution, 7th Amendment.....1, 18

U.S. Constitution, art., III, Section 2.....3

U.S.C. Title 28, Part IV, Chapter 85, Section 1331.....3

U.S.C. Title 28, Part IV, Chapter 89, Section 1441(b).....3

U.S.C. Title 18, 1001.....6

Federal Land Policy and Management Act.....17

Federal Mining Law of 1872.....3, 8, 17

C.F.R. Title 43, Sections 2300, 3700, 3800.....3

California Const., art., I, Section 7.....3, 27

California Const., art., I, Section 16.....3, 17

CCP § 473.....passim

CCP §592.....passim

CCP § 634.....17, 20
CCP § 128.5.....26, 27
CCP § 128.6.....27
CCP § 128.7.....26, 27
California Rules of Court, Rule 52.....17, 21
CRC Rule 232.5.....12, 19, 20, 21, 22
California Penal Code, §134.....28
California Penal Code, §132.....28
California Penal Code, §118a.....28
California Penal Code, §119.....28
California Penal Code, §126.....28
California Penal Code, §129.....28
California Penal Code, §124.....28
Business & Professions Code §6068(d)(g).....28
Business & Professions Code §6106 28

Other Authorities

2 California Continuing Education of the Bar, California Civil Appellate Practice §22.6, at 960 (3d ed. 1997.....28
United States Reports by Supreme Court Reporter William Cranch, Preface, 5 U.S. [1 Cranch] (1801).....30

Table of Appendices

Pages

1. Unpublished "Opinion" Court of Appeal of the State of California, Third Appellate District, June 24, 2002.....A1
2. Appellate Court's Denial of Petition for Rehearing July 22, 2002.....B1
3. California Supreme Court's Denial of Petition for Review, September 11, 2002.....C1
4. "Order After Hearing of November 29, 1999" Superior Court of the State of California, In and For the County of Lassen, February 23, 2000.....D1
5. "Appellants' Petition for Rehearing" Court of Appeal of the State of California, Third Appellate District, July 2, 2002.....E1
6. "Appellants' Petition for Review Supreme Court of California, August 5, 2002.....F1
7. "Statement of Decision" Superior Court of the State of California, In and For the County of Lassen, April 28, 1999.....G1
8. "Judgment For Permanent Injunction and Determining Right of Possession To Mining Claims.....H1
9. "U.S. Code Title 28 Part IV; U.S. Constitution Article III, Section 2; California Penal Code §§ 132, 134, 118a, 119, 124, 126, 129; California Code of Civil Procedure, § § 473(d)(b), 592, 128.5, 128.6, 128.7, 1033.5; California Business and Professions Code §§ 6068, 6106.....I-1

PETITION FOR A WRIT OF CERTIORARI

Petitioners Edwin and Madelaine Durand respectfully petition for a writ of certiorari to review the judgment in this case of the California Court of Appeals, Third Appellate District.

OPINIONS BELOW

The opinion of the Court of Appeal marked "Not To Be Published" is unreported.(App. A) Petitioner's Petition for Rehearing to the Court of Appeal was denied. (App. B) Petitioner's Petition for Review to the California Supreme Court was denied. (App. C)

JURISDICTION

The judgment of the Court of Appeal of California, Third Appellate District, was filed on June 24, 2002, in an unpublished opinion. The Court of Appeal denied a timely Petition for Rehearing on July 22, 2002. A Petition for Review was filed with the California Supreme Court on August 7, 2002, and was denied September 11, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS & U.S.C. CODES INVOLVED

The relevant portion of the due process clause, U.S. Constitution, 14th Amendment is: "...nor shall any state deprive any person of life, liberty, or property, without due process of law..."

The relevant portion of the U.S. Const. 7th Amendment

is: "the right of trial by jury shall be preserved..."

The relevant portion of the California Constitution, Article 1, Section 16, is: "Trial by jury is an inviolate right and shall be secured to all..."

U.S. Constitution, Article III Section 2
U.S.C., Title 28, Part IV Chapter 85, Sec. 1331
U.S.C., Title 28, Part IV Chapter 89, Sec. 1441(b)

CALIFORNIA STATUTES AND COURT RULES INVOLVED

Penal Code § § 134, 132, 118a, 119, 126, 129,124
California Code of Civil Procedure § 473(d)(b)
California Code of Civil Procedure § 592
California Code of Civil Procedure § 634
California Code of Civil Procedure § §128.5, 128.6, 128.7
California Rules of Court, Rule 52
Business and Professions Code §§ 6068(d)(g), 6106

STATEMENT OF THE CASE

1. BASIS FOR FEDERAL JURISDICTION

This case was filed in the Superior Court of Lassen County located in Susanville, California. This case involved the validity of mining claims located on Federal land pursuant to Federal Statutes, and the Code of Federal Regulations. The Superior Court of Lassen County lacked jurisdiction to proceed to judgment. This case also involves violations of the Petitioners Civil Rights, inviolate right to a jury trial on a legal/factual issue, and violations of Due Process as guaranteed by the Fourteenth and Seventh Amendments to the United States Constitution.

In California the question of Jurisdiction is never waived and can be introduced at any time including in a petition for Supreme Court review. Throughout the

proceedings Petitioners consistently stated the validity or invalidity of the mining claims was based on Federal law. California Mines & Mining statutes have been mostly repealed. The Federal "Mining Law of 1872" as amended is the controlling law for all Federal/BLM public lands and mining claims under Title 43 CFR Parts 2300, 3700, 3800, as well as precedent U.S. Supreme Court and Circuit Court decisions. The question of Federal Jurisdiction was raised in the Appellant's Petition for Rehearing and again in the Petition for Review filed with the California Supreme Court, which cited U.S. Constitution, Article III, Section 2, U.S.C. Title 28, Part IV, Chapter 85, Section 1331 and Chapter 89, Section 1441(b). (App F-25) Both Petitions were summarily denied without factual findings, even though California Supreme Court well-established precedent law states the issue of jurisdiction **must be addressed**.

It is common knowledge that the Seventh Amendment guarantees a right to a jury trial and the Fourteenth Amendment guarantees Due Process of law. Petitioners have continuously throughout this case requested a jury trial, but have been continuously denied their right. Although Petitioners did not specifically cite the Seventh Amendment, they did cite the California Constitution Article 1, Section 16, which states: "Trial by jury is an inviolate right and shall be secured to all..."

The first time the Fourteenth Amendment was specifically stated was in Petitioner's "Appellant's Opening Brief," which stated: "Durand filed their motion per CCP § 473 and 592 in order to preserve their rights to have all issues properly adjudicated.... and [the trial court] has also denied them their right of due process under federal (U.S. Const., 14th Amend.) and state (Cal. Const., art. I, 7) Constitutions." The opposing parties and the state courts have had ample opportunity to address Petitioners rights to a jury trial and due process.

Since the state court lacked jurisdiction over federal issues, the "Judgment" entered by the trial court pertaining to the validity of the mining claims, is void, and so is every other order or judgment, which is predicated on that void judgment, such as the order denying Petitioner's right to a jury trial on their tort causes of action.

2. FACTUAL SUMMARY

On February 5, 1997, Syed Arif and Norman Rice filed a SLAPP suit (Strategic Lawsuit Against a Private Person) against Edwin Durand and American Pozzolan Corporation. American Pozzolan Corporation was dismissed from the case, yet Respondent's attorney, Mr. Craig Kellison, included American Pozzolan Corporation in the "Judgment" and the **trial court refused to remove it.** The action was filed in order to coerce Petitioner to stop testifying to the illegal activities of the Respondents. The complaint requested quiet title to mining claims located on federal land overseen by the Bureau of Land Management. The Federal law requires a deed to transfer title. Respondent's only evidence of title to the mining claims known as the Ironclouds, R&Rs, and Native Americans was an admittedly forged "To Whom It May Concern" letter, which Respondent's had filed with the BLM office in Sacramento. At a hearing on June 20, 1997 in sworn testimony, Mr. Robert Novak, the alleged original locator, stated in a spontaneous exclamation that he had **never transferred title** to the Respondents. (R.T. hearing June 20, 1997, p. 144)

The Respondent's complaint also alleged five (5) other Causes of Action, all of which were abandoned by the Respondents once the Respondents realized these causes would have to be adjudicated by a jury, which they could not control, although "jury-rigging" is allegedly not uncommon in the Lassen County Superior Court. *See People*

v. Paul Berry III, Sacramento Bee, July 29, 1999 by correspondent Little.

Petitioners, Edwin and Madelaine Durand, filed a Cross-Complaint on April 17, 1997 and enjoined Mr. Matthew Huntley, Esq., Mr. Jerry Slusser, and his corporations Valtec Capital Corporation and Earthco, among others.

Petitioner filed the Second Amended Counterclaim Complaint on June 5, and his Supplemental Pleading on June 9, 1997 as ordered by the trial court, which included six (6) causes of action: Intentional Interference with Economic Relations and Injunctive Relief, Libel, Slander of Title, Quiet Title, Trespass, and Attorney Fees and Legal Costs. These pleadings, along with the First Amended Complaint, clearly stated the tort causes of action perpetrated by the Respondents against the Petitioner.

In 1991, Respondent Norman Rice entered into a business relationship with Petitioner in which he agreed to secure funding for Petitioner's business. Under a Fiduciary Duty and a Duty of Confidentiality, Respondent fraudulently induced Petitioner to turn over Petitioner's research, intellectual property, business plan and business relationship information, then breached the agreement, and used Petitioner's information to get himself funded, cutting Petitioner out of the business. Petitioner discovered that Mr. Rice had made a backdoor agreement with Mr. Swickard, owner of the Mapes ranch, and Mr. Novak, alleged original locator of the "Ironcloud," "R&R," and "Native American" claims. Later, Petitioner found the Novak claims were legally **invalid** and that the claim area was open for location. Petitioner properly located the Sierra Lady mining claims pursuant to Federal law.

Respondent has continued to the present time, his malicious acts of economic interference, theft and fraud, and has used several different artifices to try to illegally appropriate Petitioner's later research and development.

These acts as perpetrated by Respondent have gone unabated to the present day, since the trial court has refused to allow Petitioner's tort causes of action to be adjudicated by a jury.

Respondent Jerry Slusser was convicted of multiple frauds by the Commodities Futures Trading Commission. (See *Slusser v. Commodity Futures Trading Commission* (2000) 210 F.3d 783. [7th Cir. 2000]) Mr. Slusser's longtime partner is Mr. Tom Nevis, who was convicted for defrauding multiple Savings and Loans of approximately One Hundred and Twenty Million Dollars ($120 million). (See CR-94-169 DFL U.S.D.C. [E. D. Calif.] and Civ-S-95 2098 DFL U.S.D.C. [E. D. Calif.]) Another associate of Mr. Slusser, is a Mr. Mel Amaral, who was convicted of embezzlement from the U.S. Government. The Vice President of Mr. Slusser's Earthco Corporation, is Mr. Norman Jenson, a disbarred Nevada attorney convicted of possession and intent to distribute cocaine and conspiracy to defraud the IRS. U.S. District Court California, Case CR-87-0546 9/17/90.

Respondent Slusser et al. obtained confidential material, which Petitioners had given to Lassen County as part of an application to obtain a CBDG grant.

Petitioner was in negotiations with Mr. Francis Brown, to obtain funding to develop Petitioner's mining business and private property. The business with Mr. Brown also included Petitioner building Mr. Brown a business complex along with engineering work, since Petitioner is also an Engineer and California General Contractor.

Within two days of Mr. Brown contacting Mr. Simon of the Lassen County Planning Department, Respondent Slusser contacted Mr. Brown, setting up a meeting. During this meeting Respondent defamed Petitioner. Immediately upon Respondent leaving this meeting, Petitioners and witnesses read the Respondent's business plan, which had

been left for Mr. Brown to look through, and found it contained Petitioners brochure along with a copy of an article from the Small Business Monthly promoting Respondents product using Petitioner's research verbatim, constituting fraud and theft of intellectual properties. The purpose of Respondent's meeting with Petitioner's funding source was strictly to interfere with Petitioner's business and slander Petitioner's business reputation.

The use of Petitioner's brochure and name in the Respondent's business plan has a two-fold effect. To those who know the fraudulent business practices of the Respondents, the inclusion of the Petitioner's research and intellectual property make it appear that Petitioners were a part of the Respondent's fraudulent activity. Petitioner's have actually been accused of being the "new front men for the old crooks." To those who do not know of the Respondent's background, the inclusion of the technical data produced by Petitioner makes Respondent appear legitimate. However Respondents have not changed their ways since their convictions. Such association that this inclusion perpetuates has been, is, and continues to be devastating to the Petitioner's business.

Petitioner's tort causes of action were never predicated upon the quiet title to some mining claims and this fact was made perfectly clear, stated and restated numerous times to the lower courts.

Shortly after the hearing on June 20, 1997, Plaintiff's first attorney, Mr. Bert Guerra, abandoned their case once he realized the Plaintiff's claims were all false. He was replaced by Mr. Craig Kellison, an attorney from Susanville, California, and a U.S. Magistrate, appointed by Chief United States District Judge William Shubb of Sacramento. Since Mr. Kellison's duties as a U.S. Magistrate includes cognizance over federal BLM land in all of Northern California, where the mining claims in question

were located, he has a direct conflict of interest, especially since the "Judgment" on the Quiet Title to the mining claims, written solely by Mr. Kellison, egregiously violates the Code of Federal Regulations, federal law, and the Mining Law of 1872, which Mr. Kellison is sworn to uphold. (According to the Statement of Decision written by Mr. Kellison it is now legal to use a forged letter to transfer title at the BLM.)

The first judge on the case was Presiding Judge Stephen D. Bradbury, former law partner of Mr. Craig Kellison. Judge Bradbury was the president of the California Judges Association for the term of September 23, 2001 to October 12, 2002, and is a member of the Trial Court Presiding Judges Advisory Committee. Judge Bradbury recused himself as he had personal knowledge of the real property and mining claims involved in the case.

Judge Guy Martin Young was assigned to the case, had presided over several hearings, and had made numerous decisions in law and fact. However, when Judge Young made a statement that, based on the testimony and evidence, Petitioner would prevail, Mr. Matthew Huntley, Esq., a client of Mr. Kellison and was in default, filed a peremptory challenge, without notice to Petitioner, and Judge Young suddenly disappeared. (R.T. 11/19/97, p.30-31)

Petitioner filed a peremptory challenge against the next assigned judge, Judge Ridgely L. Lazard, because of his known close relationship with Mr. Kellison. At the hearing Judge Lazard stated, "Gee, Craig, I guess I can't help you out today because they (Petitioners) threw me off."

Judge Young had already stated the case was to be bifurcated with Quiet Title to be heard first and Petitioners tort causes of action to be heard separately. Petitioner's tort causes of action were not predicated upon the outcome of the quiet title. (A.A. Vol. 7, 1638)

Judge Noel Watkins presided over the hearing on March

25, 1998, wherein he bifurcated the case, with the Quiet Title to be heard first and Petitioner's tort causes of action to be adjudicated in a separate jury trial. (A.A. Vol. 7, 1843)

Municipal Court Judge Larry Dier was then assigned to the case for all purposes. Judge Dier was the sixth judge on this case. As of January 2002, Judge Dier is now a member of the Trial Court Presiding Judges Advisory Committee, along with Judge Bradbury. Judge Dier's prejudice against Petitioner was blatant and his close relationship with Mr. Kellison was clear, as evidenced by statements made in subsequent hearings and documents.

a. Witness Tampering by Respondents' Attorneys Condoned by Trial Court

As stated above, Mr. Novak had stated in sworn testimony he had never given title to Respondents Norman Rice or his partner, Syed Arif. Respondents were well aware that Petitioners had irrefutable evidence that the Respondent's only claim to title of the mining claims was a forged letter. Respondents, led by Mr. Kellison, devised a plan in which they would be able to discount the spontaneous exclamations of Mr. Novak in the June 20, 1997 hearing. Respondents could have depositioned Mr. Novak for a nominal amount at any time in the preceding year and a half. But instead, Mr. Kellison paid Mr. Novak Five Hundred Dollars ($500.00) to leave his residence in Fallon, Nevada, which is 60 miles west of Reno, Nevada, where the Petitioners reside, and go to Dallas, Texas, for a deposition. Respondents counted on the fact that Petitioners could not afford to fly to Dallas, Texas for the deposition and therefore would not be able to cross-examine Mr. Novak. Mr. Kellison, Mr. Rice, and Mr. Davis

---

A.A. is an abbreviation for Appellant's Appendix filed with the Appellate Court. The references are made to show that the statements are supported by documented evidence.

spent three days in Texas for a one hour deposition, where much of the time was spent where the witness, Mr. Novak, was staying at that time. Not surprisingly, the coached and leading testimony in the deposition suddenly contradicted Mr. Novak's prior spontaneous, sworn testimony.

Petitioner had filed for a Protective Order to stop this deposition, but the trial court refused to rule on the motion. (A.A. Vol. 8 1925, 1929:20-1930:11, 1951)

The trial court allowed Mr. Novak's deposition to be read into the Record in its entirety even though Petitioners had not been able to cross-examine, but refused to allow the full text of the sworn testimony given at the hearing of June 20, 1997, by Mr. Novak, which was spontaneous, uncoached, and helpful to the Petitioner's case.

After trial on the bifurcated issue of quiet title, the trial court granted Respondents' motions for costs. Petitioners moved to tax the costs, and it was shown that Mr. Kellison was including the payment he made to Mr. Novak for his "travel expenses" from Fallon, Nevada to Dallas, Texas. (A.A. Vol. 12, p.3252) After showing the Court irrefutable evidence of the witness tampering perpetrated by the Respondents and their attorneys, especially Mr. Kellison, the Court removed the $500.00 payment to Mr. Novak from the costs. However, the Court refused to remove the $1,839.18 in costs, which included a movie and alcohol, for Mr. Kellison's and Mr. Rice's travel expenses to Texas. (A.A. Vol. 12, Page 3252) The trial court also refused to remove an expert witness fee for Mr. George Wickman, a resident of Susanville and friend of Mr. Kellison, even though such inclusion was in violation of California Civil Procedure § 1033.5. (A.A. Vol. 12, p.3279)

Based on the fact that the Respondents continuously refused to abide by the Rules of Discovery, Petitioners filed three (3) Motions to Compel. Again the trial court refused

to rule. Judge Dier did not show up for the first hearing set to hear Petitioner's Motions to Compel, and vacated the second hearing without cause, in a letter to Mr. Kellison, which stated: "This is to confirm my conversation with you..." (A.A. Vol. 10, 2609) Petitioners requested a ruling on the Motions to Compel at the beginning of trial, but Judge Dier refused to make a ruling stating:

> "...If I made a ruling favorable to the Durands [Petitioners] today, I'm not sure how the opposing parties would respond to it. So what I'm going to do is as the piece of evidence comes up or the absence of a piece of evidence is in issue, then we'll discuss what kind of remedies there are for that. There are a host of possibilities." (R.T. Trial, Vol. 1, p.14, L6-11)

At the beginning of trial on October 14, 1998, Judge Dier stated he was proceeding on the Petitioners cross-complaint rather than the Respondent's complaint. Unbeknownst to the Petitioners at the time, this completely prejudicial act shifted the burden of proof from the Plaintiffs/Respondents to the Petitioners. Again this was a premeditated act, since the Respondents could never have proved title to the mining claims based on their sole evidence, the forged letter.

On March 3, 1999, after trial on the bifurcated quiet title issue only, the trial court entered a Tentative Decision stating:

> "It is tempting to try to write a decision in this case in such clear language and with such straight forward, tight logic that the parties defendant and cross complainant could understand why their positions are untenable. Sadly, it is doubtful that that could be done. A reading of the post trial briefs shows how frustrating (Kellison and Davis) and futile (Durand Supplement One) such an attempt would be."(A.A. Vol. 12, 3100-3101)

On March 23, 1999, Petitioners filed a Request for a Statement of Decision, which reiterated the fact that there were still unadjudicated causes of action. (A.A. Vol. 12, 3169:5-17) The trial court ordered Mr. Kellison to prepare a proposed Statement of Decision, since he, himself, was unable to prepare a decision in clear, straight forward, and logical language.

b. Statement of Decision Substantiates Petitioner's Tort Causes of Action Were Never Adjudicated

The Statement of Decision and the "Judgment For Permanent Injunction and Determining Right of Possession to Mining Claims," both written by Mr. Kellison, were filed on April 28, 1999. (App G & App H) The Statement of Decision clearly stated that Petitioners tort causes of action were left unadjudicated:

> "This issue is also difficult for the Court to respond to. Apparently, the Durands maintain that the Court should sympathize with the notion that they were somehow taken advantage of by some or all of the Plaintiffs and Cross-Defendants. Here, the Plaintiffs and Cross-Defendants presented a prima facia case establishing their possessory interest to each and all of the Ironcloud, Jennifer, Native American and R&R claims. **Thus, the issue of who-did-what-to-whom would appear to be outside of the scope of the narrow issue of quieting title that was presented to this Court for consideration."** (App G -24)(Emphasis added)

Entering a "Judgment" on a bifurcated issue before all issues are adjudicated is in violation of the California Rules of Court § 232.5. The only procedure available under law for the trial court was to enter a Tentative Decision until all issues are adjudicated. This fact was brought to the attention of the trial court in the Petitioner's Motion for a

New Trial. (A.A. Vol. 12, 3210, 3211, 3212, 3222, 3227) The Motion was denied on August 20, 1999, without any reference to the unadjudicated tort causes of action, therefore leaving the Petitioners in a "Catch 22." California law states that appeals can only be from "one final judgment." All issues must be adjudicated between the parties before an appeal can be filed. Judge Dier left Petitioners without the "one final judgment" necessary for appeal, since the Petitioners tort causes of action were still unadjudicated.

Petitioners timely filed two Motions pursuant to CCP § 473 Relief from Judgment Taken by Mistake, and CCP § 592 Jury Trial, to obtain their Constitutional right to a jury trial on an issue of fact.

Motions per CCP § 473 are commonly used by attorneys to gain relief from void judgments, and judgments based on mistake, inadvertence, surprise, or excusable neglect. This Section gives the trial court the power to vacate void judgments, such as that in the Petitioners case, where the judgment was prematurely entered before all issues were adjudicated.

On February 23, 2000, not only did the trial court deny Petitioners motions, but also the trial court granted Mr. Kellison's motion deeming Petitioners to be vexatious litigants subject to a prefiling order. (App. D-2) Mr. Kellison's motion was totally devoid of evidence and case law, which could sustain such a designation, and was nothing more than a malicious, perverse, oppressive act of coercion and harassment by Mr. Kellison and the trial court, aimed at the Petitioners to scare Petitioners from filing an appeal. The Appellate Court reversed, stating: "No evidence supports the trial court's determination the Durands were vexatious litigants under subdivision (b)(2)." (App. A-12)

c. Respondents File Falsified Documents With the Appellate Court

Petitioners filed their Notice of Appeal on April 13, 2000. The case was fully briefed on April 23, 2001. Petitioners filed a Motion for Sanctions against Respondents' attorneys, Mr. Kellison and Mr. Davis, which included irrefutable, uncontroverted evidence of multiple Penal Code violations perpetrated by these attorneys on the Appellate Court level.

Respondents based their Appellate briefs on a document titled "Findings and Order After Hearing," which they allege was signed June 22, 1998. This document allegedly dismissed Petitioners tort causes of action. This document **never existed** until after the trial court had denied Petitioners CCP § § 473 and 592 motions on February 23, 2000. Petitioner's evidence was clear, convincing, and unequivocal, proving this document was more fraudulent, falsified evidence. Furthermore, Mr. Kellison falsified another document in his Respondent's brief, committing more Penal Code violations.

To anyone who is unbiased and looking for the truth, the evidence is beyond all reasonable doubt.

At the hearing on the CCP § § 473 & 592 motions on November 29, 1999, after Petitioners presented the facts that their tort causes of action had not been adjudicated and that they had a right to a jury trial on these issues, the trial court asked Mr. Kellison: "Mr. Kellison, was it your understanding that the Court intended to and did in fact dispose of all of the case with the decision that was entered?" MR. KELLISON: "Yes." THE COURT: "And the judgments. That's your position?" MR. KELLISON: "Yes." THE COURT: "So you would therefore take the position that I don't have jurisdiction now?" MR. KELLISON: "Yes."(R.T. hearing 11/29/99, 29:6-15)

Once Mr. Kellison realized the Statement of Decision he

wrote specifically stated that the tort causes of action were never considered, let alone decided, and the "Judgment," which gave title to some of the mining claims to the Petitioners, never mentioned Petitioners tort causes of action, he realized something had to be done and, viola! suddenly an order dismissing Petitioners tort causes of action appeared. The evidence, which is well documented in Petitioner's Reply Brief and Petitioner's Motion for Sanctions, is irrefutable that that "Order" never existed:

1. There was no Motion or Notice of Motion to Dismiss. (A.A. Vol. 1, p.1)
2. There was no discussion during the March 25, 1999 hearing of any motion to dismiss.
3. There was nothing in the minute order dismissing Petitioner's tort causes of action. (A.A. Vol. 7, p.1838)
4. No proposed order was sent to Petitioner.
5. **No order was ever entered in the Docket or the Clerk's register.** (A.A. Vol. 1 p.1)
6. **No "Order" was ever served on Petitioner dismissing their tort causes of action.** (During oral argument Justice Nicholson specifically asked Mr. Kellison, several times, if there was anything in the Record to prove this alleged "Order" was ever served on the Petitioners, and Mr. Kellison stated there was not.)
7. There were numerous times when the Respondents or the trial court could have referred to this so-called "Order" including the hearing on the motion for a jury trial in July, 1998, the trial itself, the post-trial briefs, the Statement of Decision, the hearing and opposition papers to Petitioners motion for a new trial, the hearing and opposition papers to the CCP § 473 and CCP § 592 motions. **It was never mentioned!**

The document had been stamped by Ms. Suzy Faulkner, clerk to Judge Bradbury, former law partner of Craig Kellison. Petitioners found the document stuck in the file

on April 13, 2000, when they filed their Notice of Appeal. That was the first time they were allowed access to the file, since up until that point the file had been in Ms. Faulkner's possession, and she had on numerous occasions refused Petitioners access.

d. Appellate Court Condones Respondents' Attorneys Penal Code Violations

The alleged Penal Code violations perpetrated by the Respondents and their attorneys Mr. Kellison and Mr. Davis include perjury, subornation of perjury, making of a false document, uttering such false document to a court of law, preparing and offering false evidence, violations of Title 18 U.S.C. 1001, along with the violations of the Business and Professions Code, which amounts to calculated malfeasance.

However, in the Appellate Court opinion the Court stated: "...the validity of this order is unclear..." One thing is clear, since these illegal acts were committed by a politically connected attorney, they and the evidence have been completely swept under the carpet in the Appellate Court's unpublished opinion. It is no wonder the general public has zero confidence in the "Justice" system.

Attorneys routinely file CCP § 473 motions. However, the trial court sanctioned Petitioners for filing their CCP § § 473 and 592 motions, which was affirmed by the Appellate Court.

Petitioners filed for sanctions in the Appellate Court based on the Respondent's attorneys alleged Penal Code and Business & Professions Code violations. The Appellate Court's opinion summarily denied Petitioner's motion without comment, citing *In re Marriage of Flaherty* (1982) 31 Cal.3d 637. The California Supreme Court in *Flaherty ibid,* states: [Sanctions] "...can serve the important purpose of penalizing the most egregious conduct without deterring

valid appellate claims." "...a few extreme examples demonstrate the necessity for a deterrent." It is appalling that the California Appellate Court obviously thinks that the above Penal Code and Business & Professions Code violations, allegedly perpetrated by Mr. Kellison and Mr. Davis, do not come up to the level of "most egregious conduct," but the Petitioner's fighting for their Constitutional rights does.

Since the Appellate Court found that the Respondents' briefs were **completely without merit** and that the so-called "Order" was **"unclear,"** the Appellate Court had to find another basis for affirming the trial court's (Mr. Kellison's) denial of the Petitioner's right to a jury trial. It did so by **presuming** the trial court had determined the Petitioner's causes of action had "become moot upon its resolution of the quiet title action."

It was clearly shown to the Appellate Court that the trial court had never considered, let alone determined, Petitioner's tort causes of action, as evidenced by the Statement of Decision. (App G-24) The Appellate Court had to violate California Rules of Court Rule 52, CCP § 634, and extensive case law, which **prohibits** the Appellate Court from presuming an event occurred when the Record clearly shows it did not. The Appellate Court has hidden these violations by the use of the "unpublished opinion."

Petitioners also demonstrated that the trial court lacked jurisdiction over the validity of Federal mining claims, since the question in Petitioner's Cross-Complaint, which was what the trial court proceeded on at trial, deals with Federal land, Federal Bureau of Land Management mining claims, the Code of Federal Regulation, the United States Code, the Mining Law of 1872, and the Federal Land Policy and Management Act. Any "Judgment" where the court lacks jurisdiction is void. Any subsequent ruling based on a void judgment is also void.

The Petitioners have an inviolate right to a jury trial on an issue of fact, guaranteed by the California Constitution and the U.S. Constitution, Seventh Amendment, along with a right of Due Process, as guaranteed by the Fourteenth Amendment. Petitioners have been denied their Constitutional rights.

REASONS FOR GRANTING THE PETITION

1. California Appellate Court's Decision Violates the U.S. Constitution Seventh and Fourteenth Amendments and U.S. Supreme Court Precedents

It is common knowledge that the Seventh Amendment of the U.S. Constitution along with Article 1, Section 16 of the California Constitution preserves an inviolate right to a jury trial. Also, the U.S. Constitution Fourteenth Amendment, and California Constitution Article 1 Section 7 guaranties the right of Due Process. In the present case the California courts have trampled on the U.S. and California Constitutions, and have completely ignored well-established U.S. Supreme Court precedent. Petitioners had continuously requested a jury trial.

In *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 110 S.Ct. 1331 (1990) Justice Marshall, one of the most respected Justices, stated, in pertinent part: "The Seventh Amendment preserves the right to trial by jury in "Suits at common law." "When legal and equitable claims are joined in the same action, "the right to jury trial on the legal claim, including all issues common to both claims, remains intact.... only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to jury trial of legal issues be lost through prior determination of equitable claims."

As already noted, the trial court bifurcated the case between quiet title and Petitioner's tort causes of action,

tried the issue of the validity of the federal mining claims, without jurisdiction to do so, and entered a "Judgment For Permanent Injunction and Determining Right of Possession To Mining Claims" on April 29, 1999 in violation of the California Rules of Court, Rule 232.5. (App H) Subsequently, the trial court arbitrarily refused to allow a jury trial on Petitioner's tort causes of action, which were not predicated on the quiet title of some mining claims, thus violating the Petitioner's Constitutional Rights to a jury trial and Due Process.

2. Trial Court Was Barred From Entering Judgment Until All Issues Were Adjudicated

California Rules of Court, Rule 232.5, bars a trial court from filing a final judgment in a bifurcated trial, until all issues between the parties have been adjudicated.

> Rule 232.5 states in pertinent part: "When a factual issue raised by the pleadings is tried by the court separately and prior to the trial of other issues, the judge conducting the separate trial shall announce the tentative decision on the issue so tried...**but no proposed judgment shall be prepared until the other issues are tried,** except when a.... separate judgment may otherwise be properly entered at that time." (Emphasis added)

The only supporting case law for this Rule where a separate judgment is allowed to be entered, is in a liability/damages situation. That is not the case in the present action. Petitioner's tort causes of action were **not** predicated on the bifurcated quiet title issue, and, according to Justice Marshall, even if they were, the right to a jury trial "remains intact."

It was brought to the trial court's attention, in the Request for the Statement of Decision, that the Petitioner's tort causes of action had not been adjudicated.

The trial court **never considered or determined** the Petitioner's tort causes of action, as evidenced by the Statement of Decision filed April 28, 1999. (App G-24)Then, after the Petitioner's moved the trial court for a jury trial on their tort causes of action, the trial court suddenly changed it's story in it's "Order" filed February 23, 2000, stating: "the Durands having lost on the issue of ownership of the disputed claims, there is nothing left to litigate." (App D-2)

It is well established that a viable cause of action cannot disappear suddenly without Due Process of law as guaranteed by the Fourteenth Amendment. The Record on Appeal contained everything that had occurred between the filing of the Statement of Decision and the filing of this "Order," and the Record is completely devoid of any document, motion, order, transcript, or hearing, which could be construed as a change from the "never considered" status to they no longer exist.

The California Court of Appeal's opinion stated: "Here, the trial court determined the Durands' remaining causes of action became moot upon its resolution of the quiet title action. As a result, the trial court concluded it had nothing left to adjudicate, and it properly entered judgment at that time as allowed by rule 232.5." **This statement is false and in direct conflict with the trial court's Statement of Decision.**

The California Appellate Court's opinion is devoid of any evidence to substantiate its presumption, that the trial court had determined Petitioner's tort causes of action had become "moot," since **there is no evidence** to support such a presumption.

California statutes and well-established precedent case-law bar the Appellate Court from making such a presumption, when in fact no such determination or ruling was ever made.

California Civil Procedure, § 634 states:

"When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, **it shall not be inferred** on appeal or upon a motion under Section 657 or 663 that the trial court decided in favor of the prevailing party as to those facts or on that issue."(Emphasis added)

Clearly, in this case, the Statement of Decision did not resolve the controverted issues in Petitioner's tort causes of action, and, as such, the Appellate Court is completely barred from presuming it did.

Further, California Rules of Court, Rule 52, states in pertinent part:

"If a record on appeal does not contain all of the papers, records and oral proceedings, but is certified by the judge or the clerk, or stipulated to by the parties, in accordance with these rules, it shall be presumed in the absence of proceedings for augmentation that it includes all matters material to a determination of the points on appeal..."

The Record was complete and the only documentation that the Respondent's added were documents proven, unequivocally, to be **falsified** by the Respondents. The multiple Penal Code violations along with the Business and Professions Code violations are extensive and were all completely ignored by the California Appellate Court.

3. Appellate Court Had To Fictionalize the Record in Order to Affirm the Trial Court Decision

Most importantly, Petitioners argued that under CCP § 473(d) the trial court had the power to "set aside any void judgment or order."

Why was the "Judgment" void? For two reasons. Prematurely entering a judgment in a bifurcated trial before all issues were adjudicated, as in the present case, was strictly prohibited by Rule 232.5. Secondly, since the validity of federal mining claims was a federal question dealing with Federal laws, the trial court had no jurisdiction over those Federal matters. Any judgment from a court lacking jurisdiction is void.

Petitioners argued that since their tort causes of action were still unadjudicated, the "Judgment" of April 28, 1999 was not a final judgment, that the trial court was barred from entering it as a final judgment and therefore the "Judgment" was void. According to California Rules of Court Rule 232.5 it could only be considered a tentative decision. This was continuously brought to the attention of both the trial and appellate courts.

The Appellate Court never responded to Petitioner's argument, based on CCP § 473(d) because the only response available would have been to reverse and remand.

However, if the Petitioners were allowed to receive justice under the law, it would be impossible to sweep Respondents attorney's, especially Mr. Craig Kellison's, alleged illegal activity under the carpet. This politically connected attorney would have to face prosecution, disbarment, and impeachment as a U.S. Magistrate, based on malfeasance and moral turpitude, and, if there is any justice, be required to spend several years in jail. The only result available, since the Respondents had no legal basis which would uphold the trial court's violations of the Petitioner's rights, would be for the Appellate Court to **fictionalize the Record**, find against Petitioners, ignore both the U.S. and California Constitutions and the U.S. Supreme Court precedents, and bury it all in an unpublished opinion, leaving Petitioners practically no chance of reversal of the arbitrary violations of Petitioner's

Civil Rights.

Simply said, if a court has not considered a tort cause of action, it therefore has not determined that cause of action. If it has not determined a cause of action, the cause of action still stands unadjudicated. If a Record clearly shows that the trial court has refused proper adjudication of a tort cause of action by a jury trial, the Appellate Court is **barred from fictionalizing** a reason for the arbitrary, illegal refusal to allow a jury trial. Only in the practice of voodoo law, can a viable cause of action **go poof and suddenly disappear!**

In *Lytle v. Household Manufacturing, Inc., supra, 494 U.S. 545, 110 S.Ct. 1331, p. 1336,* Justice Marshall went on to say: "It would be anomalous to hold that a district court may not deprive a litigant of his right to a jury trial by resolving an equitable claim before a jury hears a legal claim raising common issues, but that a court may accomplish the same result by erroneously dismissing the legal claim."

No evidence exists that supports the **fictional rationalization** that the Petitioner's tort causes of action were, without notice, suddenly "moot," especially since the Petitioner's tort causes of action, which were independent of the quiet title, could have been brought in a separate lawsuit. Also, what the trial court forgot and the Appellate Court refused to acknowledge was the fact that the Petitioners still have mining claims. According to *Lytle v. Household Manufacturing, Inc., supra, 494 U.S. 545, 110 S.Ct. 1331, p.1337,* which states: "See *Meeker v. Ambassador Oil Corp.*, 375 U.S. 160, 84 S.Ct. 273, 11 L.Ed.2d 261 (1963) *(per curiam)* (reversing trial court's decision to try equitable claims first and thereby to bar jury trial on legal claims that relied on the same facts)," even if Petitioner's tort causes of action totally relied on the ownership of the mining claims, the trial court cannot refuse to allow a jury trial on the legal issues. The fact remains that the lower courts violated both

the U.S. and California Constitutions, and U.S. Supreme Court precedents, as well as the California Rules of Court, when it denied Petitioner's Constitutional right to a jury trial and Due Process.

Furthermore, *Lytle, supra 494 U.S. 545, 110 S.Ct. 1331, p. 1337*, states: "Our conclusion is consistent with this Court's approach in cases involving a wrongful denial of a petitioner's right to a jury trial on legal issues...**we have reversed and remanded each case in its entirety for a trial before a jury.**" (Emphasis added.)

4. Appellate Court's Opinion Is Contrary To Its Own Decision In An Earlier Case

CCP § 473(b) states in pertinent part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."

The California Appellate Court stated that the trial court had no discretion but to deny Petitioner's Motion per CCP § 473, since Petitioners had failed to argue their loss of a jury trial was based on their own mistake, inadvertence, surprise, or excusable neglect.

The case used by the Appellate Court was only one of two cases, which stated the trial court had "no discretion," in an incredibly extensive amount of precedent case law pertaining to CCP § 473 motions. Case after case stated the motion should be granted except for the most egregious acts causing inexcusable neglect. California Supreme Court decisions pursuant to CCP § 473 state that if there is **any doubt**, that the motion **must** be granted in order to meet the ends of substantial justice. "The trial court's discretion is not unlimited and must be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice."(*See Elston*

v. City of Turlock (1985) 38 Cal.3d 227, 233, 695 P.2d 713, 211 Cal.Rptr. 416)

In fact, just a few months before the present opinion was filed, this same Appellate Court reversed a lower court's denial of a CCP § 473 motion, even though neither the appellant nor his attorney ever admitted to mistake, inadvertence, surprise, or excusable neglect. "Because neither declaration contains any sworn admission of mistake, inadvertence, surprise, or error, Pietak has not demonstrated that he is entitled to relief..."*State Farm Fire & Casualty Company v. Pietak, (2001) 90 Cal.App.4th 600, 109 Cal.Rptr.2d 256.*

According to the case law used by this same Appellate Court in the present case, without an admission of mistake, inadvertence, surprise, or excusable neglect the court has "no discretion" but to deny the motion per CCP § 473. However, in *State Farm Fire & Casualty Company v. Pietak, supra, (2001) 90 Cal.App.4th 600,* the Appellate Court reversed the denial and remanded for a trial. The decision in the present case is directly contrary to the decision in *State Farm Fire & Casualty v. Pietak, ibid.*

How can an Appellate Court rule one way one day and then exactly the opposite just a few months later? It's simple. Do it in an unpublished opinion.

5. The Sanctions Granted Against Petitioners Violated the 14th Amendment

A motion pursuant to CCP § 473 is specifically used to relieve a party of a dismissal, which was entered without their knowledge. The statute allows a party to file for relief within six months after finding the default or dismissal. Had the Petitioners actually been served with an order stating their tort causes of action were dismissed, they would have been able appeal that decision. However, the trial court **never dismissed** their tort causes of action, **never**

noticed the Petitioners that their tort causes of action no longer existed, and as such the trial court violated the 14th Amendment guarantying Due Process.

The prejudice of the Appellate Court against the Petitioners is extremely clear, as evidenced by the section of the opinion pertaining to the sanctions. The Petitioners were sanctioned by the trial court in the amount of $2,000.00 based on the Petitioner's filing their CCP § 473 motion.

The trial court granted sanctions under CCP § 128.5 and CCP § 128.7. (App D-2) The trial court acted beyond its jurisdiction since CCP § 128.5 pertains specifically to cases where "the actions or tactics arise from a complaint filed, or a proceeding initiated, **on or before December 31, 1994.**" The present case was filed February 5, 1997. Accordingly, reversal was warranted.

As to the sanctions per CCP § 128.7, the trial court is required to support the granting of sanctions with specific factual findings setting out the misconduct being sanctioned and the basis for the amount of sanctions. CCP § 128.7(e) states: "when imposing sanctions, the court **shall** describe the conduct determined to constitute a violation of this section and explain the basis for the sanction imposed." The trial court made no effort to abide by the statute, and accordingly, reversal was warranted.

CCP § 128.7(c)(1) states: "A motion for sanctions under this section shall be made separately from other motions or requests..." Mr. Davis never filed a "motion" for sanctions, he tagged a "Request for Sanctions" on to his "Opposition" to Petitioner's CCP § § 473 and 592 motions. Accordingly, reversal was warranted.

Under CCP § 128.7, a trial court cannot arbitrarily grant sanctions without a 30 day notice, whether it is based on a motion by the opposing party or by the court itself. This is called the "safe harbor" provision, which is well-

documented in case law. Mr. Davis' "request" was pursuant to CCP § 125.8, a non-existent statute. The trial court granted him sanctions under CCP § 128.5, a statute the trial court was barred from using, and CCP § 128.7 in violation of that statute's "safe harbor" provisions.

> "Notice that sanctions were sought under section 128.7 was not sufficient to warn *Levy* or *Guy* that sanctions might be awarded under section 128.5. Therefore, the order imposing sanctions against them **must be reversed**." (Emphasis added) *In re Marriage of David Reese and Joanne Guy (1999) 73 Cal.App.4th 1214, 87 Cal.Rptr.2d 339 at p. 343[1].)*
>
> "Adequate notice that sanctions are being considered is mandated by statute and the due process clauses of the federal (U.S. Const., 14th Amend.) and state (Cal. Const., art, I, § 7." *In re Marriage of David Reese and Joanne Guy, supra, (1999) 73 Cal.App.4th 1214, 87 Cal.Rptr.2d 339 at p. 343[4].)*

Accordingly, in the present case, reversal was warranted.

In order for the Appellate Court to affirm the trial court's sanctions, the Appellate Court again had to **fictionalize the Record**.

In its opinion, the Appellate Court stated the Respondents filed motions for sanctions under sections 128.5 and 128.6. As stated above, CCP § 128.5 is barred from usage in this case. As to CCP § 128.6, that section was never before mentioned either in the trial court or Appellate Court proceedings. The use of CCP § 128.6 exemplifies the carelessness in the writing of this unpublished opinion. (App A-13)

Petitioners filed a motion for sanctions with the Appellate Court, which enumerated multiple felonious acts allegedly perpetrated by the Mr. Kellison, Mr. Davis, and their clients. **The evidence was irrefutable**, and included

Penal Code § 134, Preparing False Evidence, Penal Code § 132, Offering False Evidence, Penal Code § § 118a, 119, 126, 129, Perjury, Penal Code § 124, Uttering, along with violations of the Business and Professions Code § 6068(d), § 6068(g), § 6106, which deal with acts of moral turpitude, dishonesty or corruption, and Fraud on the Court. (App I)

The acts perpetrated by Respondent's attorneys, Mr. Kellison and Mr. Davis, are so egregious that Justice Nicholson, at oral argument, accused Mr. Kellison of "jury-rigging" the Record. Yet there has been no reprimand of any kind. Isn't "jury-rigging" illegal?

As to Petitioner's motion for sanctions, the Appellate Court made short shrift of these egregious acts by stating: "We deny the request." The felonious acts of fabricating and falsifying evidence, perjury, subornation of perjury, and the denial of sanctions, which were requested based on these egregious acts, make a mockery of the judicial system and exemplify a callous indifference to the law not only by attorneys but the Appellate Court as well.

UNPUBLISHED OPINIONS DENY EQUAL JUSTICE UNDER LAW

On a children's broadcast, *Nick News*, Justice Ginsberg stated: "We would have chaos and not the rule of law if each judge in the land did simply what he or she thought was right instead of what the law requires." *Nick News* (Channel 36, San Francisco Area, TV rebroadcast, 12/27/97)

"If the court of appeal decision is unpublished, it has no precedential value by definition, and therefore the supreme court will usually deny the petition for review...**It is nearly review-proof** because it has no precedential value." (2 California Continuing Education of the Bar, California Civil Appellate Practice § 22.6, at 960 (3d ed. 1997)) (Emphasis added)

The hurdle of having an unpublished opinion reviewed

by the U.S. Supreme Court is so high that the lower courts are almost completely assured that any arbitrary decision they make will never be reviewed let alone overturned. The Rule of Law, especially in the present case, has been thrown out the window.

Schmier v. United States Court of Appeals for the Ninth Circuit and Judicial Council of the Ninth Circuit 279 F.3d 817(Cir. 9 2002) raised the question that unpublished opinions deny equal justice. The Ninth Circuit Court of Appeal's opinion in stated:

> "Given the wide range of interest shown in the debate about unpublished opinions...we think it is only a matter of time before the theoretical questions raised by Schmier's complaint are all properly presented and resolved."

Most litigants who have gone through the Judicial system, as have the Petitioners, and who have met with the multiple violations of their Constitutional rights, as illustrated in the present case, are completely drained financially, physically, and emotionally. Many don't make it to the Appellate stage, let alone the state Supreme Court. Most don't have the chutzpa, especially in pro se, to even contemplate petitioning the U.S. Supreme Court, so this Court may not be aware of the devastating effects of these unpublished opinions, which violate U.S. Supreme Court precedent and the U.S. Constitution. It is obvious from the *Schmier* opinion that the time is now for this Court to decide this question and use its power to force the lower courts to abide by the law instead of hiding arbitrary decisions in unpublished opinions.

In the first volume of the United States Reports by Supreme Court Reporter William Cranch he stated:

> "Even in the same court, analogy of judgment cannot be maintained if its adjudications are suffered to be forgotten...In a government which is

> emphatically styled a government of laws, the least possible range ought to be left for the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge. He cannot decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public. The avenues to corruption are thus obstructed, and the sources of litigation closed." (Preface, 5 U.S. [1 Cranch] (1801))

In *County of Los Angeles v. Kling*, 474 U.S. 936 (1985), Justice Stevens referred to unpublished opinions as "secret law." He further states: "For, like a court of appeals that issues an opinion that may not be printed or cited, this Court then engages in decision-making without the discipline and accountability that the preparation of opinions requires."

Unpublished opinions can conceal an Appellate Court's extreme departure from established law, court rules, and precedents, without the need to be accountable, thus opening "the avenues to corruption" and tyranny. Published opinions help to guarantee Equal Justice Under Law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Madelaine Durand Edwin Durand

Madelaine Durand Edwin Durand

P.O. Box 34719
Reno, Nevada 89533
(775) 345-0141